# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Question presented | 1 |
| Rules involved | 2 |
| Statement | 3 |
| Argument | 7 |
| Conclusion | 11 |
| Appendix | 12 |


## CITATIONS

Cases:


| | |
|---|---|
| *Carolina Casualty Insurance Co.* v. *United States*, 283 F.2d 248 | 8 |
| *Continental Casualty Co.* v. *United States*, 314 U.S. 527 | 8 |
| *Dudley* v. *United States*, 242 F.2d 656 | 9 |
| *Kirk* v. *United States*, 131 Fed. 331, affirmed *per curiam*, 204 U.S. 668 | 7 |
| *Larson* v. *United States*, 296 F.2d 167 | 8 |
| *Smith* v. *United States*, 357 F.2d 486 | 9 |
| *Stack* v. *Boyle*, 342 U.S. 1 | 9 |
| *Stanton* v. *United States*, 226 F.2d 822 | 8 |
| *United States* v. *Accardi*, 241 F. Supp. 119 | 8 |
| *United States* v. *D'Argento*, 339 F.2d 925 | 8 |
| *United States* v. *Davis*, 202 F.2d 621, certiorari denied *sub nom. Ferguson* v. *United States*, 345 U.S. 998 | 8 |
| *United States* v. *Peerless Insurance Co.*, 343 F.2d 759, certiorari denied, 382 U.S. 832 | 8 |
| *United States* v. *Public Service Mutual Insurance Co.*, 282 F.2d 771 | 8 |




307-340—68

**Miscellaneous:**


| | Page |
|---|---|
| 4 Blackstone *Commentaries*, 297 | 9 |
| **F.R. Crim. P.:** | |
| Rule 46(c) | 9 |
| Rule 46(f) | 2, 7 |
| Rule 46(g) | 2, 11 |
| Rule 20 | 4, 5, 6 |
| Rule 20(a) | 3 |

# In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1361

SUMMIT FIDELITY AND SURETY COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The order of the court of appeals (Pet. App. 1–3) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on March 1, 1968. A petition for rehearing was denied on March 21, 1968. The petition for a writ of certiorari was filed on April 24, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether the district court abused its discretion in refusing to set aside the forfeiture of an appearance bond.

## RULES INVOLVED

Rules 46(f) and (g), F.R. Crim. P., provide as follows:

(f) FORFEITURE.

(1) *Declaration.*—If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

(2) *Setting Aside.*—The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) *Enforcement.*—When a forfeiture has not been set aside the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.

(4) *Remission.*—After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

(g) EXONERATION.—When the condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of

the bond or by a timely surrender of the defendant into custody.

Rule 20(a), F.R. Crim. P., provides as follows:

> (a) *Indictment or information pending.*—A defendant arrested or held in a district other than that in which the indictment is pending against him may state in writing that he wishes to plead guilty or *nolo contendere,* to waive trial in the district in which the indictment or information is pending and to consent to disposition of the case in the district in which he was arrested or is held, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is held and the prosecution shall continue in that district.

STATEMENT

On August 9, 1966, an indictment was filed in the United States District Court for the Northern District of Illinois, charging Sean Kelley and Mildred Nichols with conspiracy to steal currency in excess of $100 from federally insured banks, and with the substantive offenses. Each of the defendants executed an appearance bond in the amount of $5,000 with petitioner as surety (App. 1–2).[1]

[1] "App." refers to the Appendix to petitioner's brief in the court of appeals, which petitioner has filed herein. A copy of the bond is attached as an Appendix to this brief.

On the morning of Thursday, November 10, 1966, when the case was called for trial, neither of the defendants nor an attorney for them was present. The Assistant United States Attorney told the court that, a few minutes previously, he had received a telephone call from a Mr. Goldsmith that both defendants were with him in Milwaukee and were planning to appear in the United States District Court there to plead guilty, pursuant to Rule 20, to charges pending against them in three federal court jurisdictions—Milwaukee, Chicago and Las Vegas. Mr. Goldsmith had said that he would call back around 11:00 a.m. and advise what had happened. The government attorney suggested that the case go over until 2:00 o'clock and the court so ordered (App. 10).

When the case was called at 2:00 p.m., the government attorney told the court that shortly before noon he had conversed with the United States Attorney at Milwaukee, who had informed him that the case there had been set for trial, but that both defendants and Mr. Goldsmith had appeared and indicated a desire to change their pleas to guilty. At the last moment, however, defendant Nichols had changed her mind. The court inquired as to the amount of the bail bonds and noted that no lawyer representing the defendants was present. It then ordered that the bonds be forfeited and that a warrant be issued for the apprehension of the defendants (App. 11–13).

The Kelley-Nichols case was called in the Chicago court on the following Monday at 10:00 a.m. The defendants, who had been taken into custody were present, along with Mr. Goldsmith. Mr. Goldsmith

apologized for the absence of his clients on the preceding Thursday. He stated that the defendants did not know that they were scheduled to appear on Thursday, and that he had asked them to come to Milwaukee, where they were initially arrested, for the purpose of pleading guilty under Rule 20 to the three charges pending against them; that he had been engaged in another trial and had obtained a recess for this purpose. The court pointed out that the rule required local counsel and ordered that the defendants be remanded to the custody of the marshal. Mr. Goldsmith's request that the order terminating the bond be vacated was denied. The case was adjourned to the afternoon (App. 13–18).

When the case was called that afternoon at 2:00 o'clock, petitioner's counsel was present and moved the court for vacation of its order forfeiting the bond. He stated to the court that the surety company was blameless and that he was prepared to introduce evidence that its representatives had notified each of the defendants a few days before November 10 that they were to be in court on that date. The court replied that the liability of a surety was not dependent upon whether it was subject to blame. It stated that the only way to compel attendance of defendants was through forfeiture of their bonds if they failed to appear. The court denied the motion to vacate (App. 18–20).

The case went to trial that afternoon after a motion for a continuance to enable Mrs. Nichols to plead guilty in Wisconsin was denied (App. 21–23). On November 16, Mr. Goldsmith moved for a mistrial, stating that one defendant had prior to trial perfected

papers for a transfer under Rule 20 and that both presently desired to have all matters disposed of before the Wisconsin court. Over government objection, the court sustained the motion and ordered the marshal to convey the defendants to Wisconsin. At the conclusion of the proceeding the court thanked Mr. Goldsmith for his careful representation of his clients and his courtesy to the court (App. 24–26).

On December 8, 1966, petitioner filed a written motion to vacate forfeiture of the bond. Petitioner alleged that its agent, on November 7, 1966, had advised both defendants that the cause was set for trial on November 10; that at about 3:30 p.m. on November 10 its agent had telephoned the clerk of the court and learned that a bench warrant for the arrest of the defendants had been issued; that on November 13 its agents had contacted the defendants and had brought them into court on the following morning; that the processes of the court had not been significantly affected by defendants' earlier failure to appear, because of the continuing trial of the other case. The motion was denied (App. 3–4). On January 16, 1967, the government's motion for judgment on the bond forfeitures was sustained and judgments were entered (App. 4).

On January 30, 1967, petitioner moved for remission of each judgment, reiterating its earlier allegations. It further alleged that, after the Rule 20 transfer to the Wisconsin court, both defendants pleaded guilty and, having previously posted a $2,000 cash bond in Wisconsin, were released on their own recognizance in the Chicago case. Petitioner argued that such release exonerated the defendants of any forfeiture. The mo-

tion further alleged that notice of the government motion for judgment was received in the office of its attorney on the morning of January 16, 1967, but that its attorney was out of town at the time and was thus unable to oppose it. In a memorandum in support of the motion for remission filed on February 8, 1967, petitioner contended that the government should be required to move for retention of the cash deposit of $2,000 which each defendant had earlier posted in Milwaukee in May and June of 1966 (App. 4, 6–7).[2]

ARGUMENT

1. Subsection (1) of Rule 46(f) provides in mandatory terms that, if there is a breach of condition of a bond, the district court *shall* declare a forfeiture of the bail. Setting aside or remitting the forfeiture, however, under subsections (2) and (4) is permissive—the court "may" take such action. There is no question but that there was a breach of condition here which required the court's action in declaring the forfeitures. The case was set for November 10. Neither of the defendants appeared; nor was any of their counsel or any representative of the bonding company present.[3] The defendants were unquestion-

[2] On April 11, 1967, the cash deposits made by the defendants in Milwaukee in the other cases were released (App. 8–9).

[3] Petitioner seems to think there was an irregularity because the forfeiture was not ordered at 10:00 a.m. It appears, however, that the court was under the impression that Mr. Goldsmith's activities in Milwaukee were because he was scheduled to appear before the district court there (App. 10). In any event, the continuance would not invalidate the forfeiture. *Kirk v. United States*, 181 Fed. 331 (N.D. N.Y.), affirmed *per curiam*, 204 U.S. 668.

ably aware of the setting, as shown by the presence of their local counsel when the setting was made, by the long-distance call of their attorney, Mr. Goldsmith, to the Assistant United States Attorney a few minutes before the case was called, and by the assertion of petitioner's counsel that notice thereof had been given to them (App. 10, 14, 16, 17, 20). The condition of both bonds was the appearance of the principals at the time set. Nothing less satisfies the condition. *Continental Casualty Co.* v. *United States*, 314 U.S. 527, 530.

2. With respect to remission of the forfeitures, it is established that this is a matter for the sound discretion of the trial court, reviewable only for abuse thereof. The mere fact that the reviewing court may feel that it would have been inclined to make a different disposition of the matter is insufficient ground for reversal. In view of all the circumstances of this case, there was no abuse of discretion here. See *United States* v. *Davis*, 202 F. 2d 621 (C.A. 7), certiorari denied *sub nom. Ferguson* v. *United States*, 345 U.S. 998; *Larson* v. *United States*, 296 F. 2d 167 (C.A. 8); *Carolina Casualty Insurance Co.* v. *United States*, 283 F. 2d 248 (C.A. 5); *United States* v. *Public Service Mutual Insurance Co.*, 282 F. 2d 771 (C.A. 2); *Stanton* v. *United States*, 226 F. 2d 822 (C.A. 9); *United States* v. *Peerless Insurance Co.*, 343 F. 2d 759 (C.A. 2), certiorari denied, 382 U.S. 832; *United States* v. *Accardi*, 241 F. Supp. 119 (S.D.N.Y.).*

* *United States* v. *D'Argento*, 339 F. 2d 925 (C.A. 7), an earlier Seventh Circuit case upon which petitioner places par-

3. The circumstances on which petitioner attempts to rely to show an abuse of discretion do not serve to excuse the deliberate failure of either defendant or their counsel to appear on the date scheduled. The historic purpose of bail is to secure the presence of the accused at trial and to respond at all other times he may be required by the court to be present, at the same time affording an accused freedom from harassment and confinement before his guilt has been proved. 4 Blackstone *Commentaries*, 297; *Stack* v. *Boyle*, 342 U.S. 1; *Smith* v. *United States*, 357 F. 2d 486 (C.A. 5). The amount of the bail, under Rule 46(c), is to be such as will insure the presence of the defendant. The possibility of forfeiting this sum is the incentive

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ticular reliance, is readily distinguishable. The principal was there absent from the Northern District of Illinois to comply with a previous order of a State criminal court requiring him to appear in Los Angeles. He did not understand this as being impermissible under his bond, which made an exception for absences "in accordance with such orders or warrants as may be issued." No appearances in the Northern District of Illinois were missed. The court of appeals reversed a district court order forfeiting his bond. In *Dudley* v. *United States*, 242 F. 2d 656 (C.A. 5), the trial court verbally ordered that defendants Dudley and Londos appear before it on February 3, 1956, for what purpose does not appear. On the same day, a bench warrant for the arrest of Dudley was issued and his bond raised to $50,000. Pursuant to the warrant, Dudley was arrested and was in custody in Laredo on February 3, making it impossible for him to appear in the court which had ordered his arrest. Although the court was informed of this, it ordered forfeiture of his bond. Londos, although he had been contacting his attorney regularly, was not readily located and his bond was forfeited some days later. Four days thereafter, he gave himself up voluntarily. There was no delay in the trial, which was held as scheduled. The court of appeals held there should be a remission of the forfeiture.

which induces the surety to see that his principal promptly appears. Here the surety did nothing but give a notice to the defendants some days in advance that they were to be present in court. It was not present, through its representative, at either the morning or afternoon session and knew nothing about the default until the late afternoon of November 10. The ruling of the court below should not, as petitioner argues, render it difficult for persons without adequate collateral to obtain bail in the Seventh Circuit; sureties simply should be more alert to discharge their duties in a responsible fashion.

Advice of counsel cannot be deemed an excuse for the default here. Although the case had been firmly set for trial, it was not until a half-hour before trial time that counsel telephoned the information that he and his clients were otherwise occupied in Milwaukee.[5] It developed that nothing had been set in Milwaukee and that Mr. Goldsmith did not even have a firm understanding with one of his clients about her pleading guilty. In the meantime, the local attorney made no appearance in court. Information as to developments was gained only through the two United States Attorneys' offices. As the court of appeals noted (Pet. App. 3), it was only the happenstance that a prior case had not been concluded that made it possible for the court to keep occupied despite defendants' default in appearance.

[5] Departure from the Northern District of Illinois was in itself a violation of a condition of the bond, aside from the fact that defendants' case was set for trial.

Subsequent events did not absolve the defendants or necessitate remission of the forfeiture. The fact that the court thanked Mr. Goldsmith for his careful representation of the defendants and his courtesy to the court after the trial commenced was not absolution for the prior default. Nor does the action of the District Court for the Eastern District of Wisconsin in permitting defendants to go free on their recognizance in this case for a short period after their plea of guilty relate back to justify their earlier non-appearance in another court. In view of their adequate bail in the other two cases, there was no occasion to cause the defendants extra expense to replace their forfeited bail in this case. However, the $2,000 which each defendant had on deposit in the other Milwaukee cases did not pertain to the Chicago case. The government had no claim thereto and was bound under Rule 46(g) to release this bail when the conditions of these bonds had been satisfied.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*
FRED M. VINSON, JR.,
*Assistant Attorney General.*
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
*Attorneys.*

MAY 1968.

## APPENDIX

**United States District Court for the Northern District of Illinois (Eastern Division)**

**No. 66 CR 515**

**UNITED STATES OF AMERICA**

**v.** **APPEARANCE BOND**

**MILDRED JANE NICHOLS**

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the United States of America the sum of five thousand dollars ($5,000.00).

The conditions of this bond are that the defendant, Mildred Jane Nichols, is to appear in the United States District Court for Northern District of Illinois at Chicago, and at such other places as the defendant may be required to appear, in accordance with any and all orders and directions relating to the defendant's appearance in the above entitled matter as may be given or issued by the commissioner or by the United States District Court for the Northern District of Illinois or any other United States District Court to which the defendant may be removed or the cause transferred; that the defendant is not to depart the Northern District of Illinois, or the jurisdiction of any other United States District Court to which the defendant may be removed or the cause transferred after he has appeared in such other district pursuant to the terms of this bond, except in accordance with such orders or warrants as may be issued by

the Commissioner or the United States District Court for the Northern District of Illinois or the United States District Court for such other district; that the defendant is to abide any judgment entered in such matter by surrendering himself to serve any sentence imposed and obeying any order or direction in connection with such judgment as the court imposing it may prescribe.

If the defendant appears as ordered and otherwise obeys and performs the foregoing conditions of this bond, then this bond is to be void, but if the defendant fails to obey or perform any of these conditions, payment of the amount of this bond shall be due forthwith. Forfeiture of this bond for any breach of its conditions may be declared by any United States District Court having cognizance of the above entitled matter at the time of such breach and if the bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in such United States District Court against each debtor jointly and severally for the amount above stated, together with interest and costs, and execution may be issued and payment secured as provided by the Federal Rules of Criminal Procedure and by other laws of the United States.

It is agreed and understood that this is a continuing bond which shall continue in full force and effect until such time as the undersigned are duly exonerated.

This bond is signed on this 10th day of August 1966 at Chicago, Illinois.

Name of Defendant: Mildred Jane Nichols. Address: 1753 N. Sawyer, Chicago.

Name of Surety: The Summit Fidelity & Surety Co., by [/s/] Joseph Cosentino, Attorney-in-Fact. Address: 10 E. 11th St., Chicago, Illinois.

**Signed and acknowledged before me this 10th day of August 1966.**

/s/ HELEN S. OSWALD,
*Deputy Clerk.*

**Approved:**

ELBERT A. WAGNER,
*Clerk.*

**Approved:**

/s/ JOHN J. COLLIER,
*Assistant U.S. Attorney.*

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